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COURT OF CRIMINAL APPEALS
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NO. PD-0381-17

IN THE COURT OF CRIMINAL APPEALS
FOR TEXAS

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COURT OF CRIMINAL APPEALS
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NO. 01-15-00187-CR

IN THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

NO. 1316546

IN THE 339TH DISTRICT COURT OF HARRIS COUNTY, TEXAS

ADRIAN AARON MENDEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

APPELLANT'S BRIEF ON STATE'S PETITION FOR DISCRETIONARY REVIEW

KURT B. WENTZ
5629 Cypress Creek Parkway, Suite 115
Houston, Texas 77069
Phone: 281/587-0088
State Bar No. 21179300

ATTORNEY FOR DEFENDANT

ORAL ARGUMENT IS NOT PERMITTED

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STATEMENT OF CASE

The appellant was indicted for the offense of murder. (CR 19).

The trial court applied a self-defense charge to the murder allegation in its charge but did not do so to the lesser-included offense of aggravated assault. The jury found the appellant guilty of the lesser-included offense and sentenced him to seven (7)

years confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR 1156-57)

The appellant filed his notice of appeal and the trial court certified his right to appeal. (CR 1154-55).

PROCEDURAL HISTORY

On February 23, 2017 the First Court of Appeals reversed the appellant's conviction because of the egregious harm caused by jury charge error. ***Mendez v. State***, No. 01-15-00187-CR, 2017 WL 711736 (Tex. App. – Houston [1st Dist.] February 23, 2017, No. Pet. H.).

On March 15, 2017 the State filed its motion for rehearing asking the First Court of Appeals to modify the language in its opinion that "overstates the State's concession" on charge error and for the first time argued there was no charge error.

On April 4, 2017 the First Court of Appeals withdrew its original opinion and judgment, modified the language relating to the State's concession of error, denied the State's motion for rehearing, and affirmed the reversal of the appellant's conviction. ***Mendez v. State***, 2017 WL 1230596 (Tex. App. – Houston [1st Dist.] April 4, 2017).

On April 26, 2017 the State filed its petition for discretionary review.

SUMMARY OF ARGUMENT

Having elected to charge Mr. Mendez' jury on self-defense without request or objection by either the State or defense, the trial court had the obligation to correctly apply that charge to the lesser-included offense of aggravated assault which it also supplied and for which the appellant was ultimately convicted. By providing the charge on self-defense the trial court made self-defense part of "the law applicable to the case." ***Vega v. State***, 394 S.W. 3rd 514, 518, 519 (Tex. Crim. App. 2013); ***Barrera v. State***, 982 S.W. 2nd 415, 416 (Tex. Crim. App. 1998). The trial court's resulting charge error was subject to egregious harm analysis under ***Almanza v. State***, 686 S.W. 2nd 157, 172 (Tex. Crim. App. 1984). ***Burd v. State***, 404 S.W. 3rd 64 (Tex. App. – Houston [1st Dist.] 2003) no. pet.). This charge error is not precluded from review under ***Posey v. State***, 966 S.W. 2nd 57 (Tex. Crim. App. 1998). ***Vega*** at 518, 519 and ***Barrera*** at 416.

ARGUMENT AND AUTHORITIES IN SUPPORT OF AFFIRMING THE JUDGMENT OF THE FIRST COURT OF APPEALS

First, the State misrepresents the First Court of Appeals' holding in its April 4, 2017 opinion on its petition for discretionary review when it concludes "[t]he First Court held that a trial commits reversible error by *sua sponte* failing to submit a self-defense instruction to a lesser-included offense instruction in the jury charge

– a defensive issue instruction stacked on another defensive issue instruction." State's petition for discretionary review at 14. The First Court held the charge given to the jury without objection contained charge error that was egregiously harmful to the appellant. ***Mendez v. State***, 2017 WL 1230596 at 11 (Tex. App. – Houston [1st Dist.] April 4, 2017).

Self-defense was not another defensive issue "stacked" upon another defensive issue. A lesser-included offense charge can be a prosecutorial issue as it was certainly was in the appellant's case. Mr. Mendez would not have been convicted of any crime had the trial judge not given an aggravated assault charge to which the State did not object. In ***Grey v. State***, 298 S.W. 3rd 644, 651 (Tex. Crim. App. 2009) this Court suggested that a prosecutor might be wise to request a lesser-included offense to ensure that the defendant would not go free when the evidence on his indicted offense is weak.[1]

More importantly, the First Court of Appeals' reliance on ***Burd v. State***, 404 S.W. 3rd 64 (Tex. App. – Houston [1st Dist.] 2013) in deciding the appellant's case was not misplaced and that opinion is not in need of reconsideration as desired by the State in its motion for rehearing. See State's Motion for Rehearing at p. 14.

[1] . Only the State addressed the possibility of lesser-included offenses in voir dire. (2RR 48-54).

As in the instant cause Burd's trial court provided his jury with a selfdefense charge on the indicted offense but failed to apply the law of self-defense to the lesser-included offense without objection or request by either party. ***Burd*** at 65 and 67. Further paralleling the instant cause, Burd was acquitted of the indicted offense (aggravated assault) but convicted of the lesser-included offense (deadly conduct).

The First Court of Appeals held this flaw in Burd's jury charge constituted charge error and found he had suffered egregious harm under ***Almanza v. State***, 686 S.W. 2nd 157, 174 (Tex. Crim. App. 1984). ***Burd*** at 71 and 75.

Self-defense was the major issue in the appellant's case. It was discussed in voir dire by both the State and defense. (2RR 48-54 and 2RR 106-109.

As in ***Burd v. State*** the admission or exclusion of evidence relating to the complainant's reputation for violence and prior acts of violence justifying the appellant's actions was the most contentious issue at trial. ***Mendez*** at 11.

Noting ". . . the State does not argue that there was no error", the First Court properly found charge error in the instant cause and concluded the appellant was egregiously harmed**.** ***Mendez*** at 9, 11. In doing so it observed the only difference between murder and the aggravated assault for which the appellant was convicted is causing the death of the complainant. ***Id***. n. 2 at 12.

The First Court of Appeals' opinion is consistent with this Court's earlier holdings in ***Vega v. State***, 394 S.W. 3rd 514 (Tex. Crim. App. 2013) and ***Barrera v.***

State, 982 S.W. 2nd 415 (Tex. Crim. App. 1998) which it noted in footnote 1 of its opinion responding to the State's motion for rehearing. ***Mendez*** at 14.

Vega's case came to this Court after the court of appeals held he forfeited charge error by not requesting a specific application instruction on entrapment or objecting to its omission relying on ***Posey v. State***, 966 S.W. 2nd 576 (Tex. Crim. App. 1998). ***Vega*** *at 515.*

Reversing the lower court this Court wrote "the trial judge is 'ultimately responsible for the accuracy of the jury charge and accompanying instructions.'" ***Id.*** at 518 citing ***Delgado v. State***, 235 S.W. 3rd 244, 249 (Tex. Crim. App. 2007). This Court went on to hold that when a trial judge does provide a defensive issue charge but fails to do so correctly there is charge error subject to ***Almanza*** review regardless of whether the charge was given *sua sponte* or at the request of counsel. ***Id.*** at 519.

This Court found the trial judge's flawed charge in ***Vega*** became "the law applicable to the case" and distinguished the facts in ***Vega,*** which mirror the facts in the instant cause, with those in ***Posey v. State.*** ***Vega*** at 519.

This Court further cited then Justice Keller's opinion in ***Barrera v. State*** saying:

> This case presents a *different* issue from that in ***Posey***, however. Rather than omitting an instruction altogether, the trial court in this case [Barrera] failed to apply an abstract instruction to the facts of the case. That is to say, even

> without a request, the trial court included the law of selfdefense in the charge to the jury. A trial court has no duty to sua sponte charge the jury on unrequested defensive issues raised by the evidence. However, having undertaken on its own to charge the jury on this issue, the trial court in this case signaled that self-defense was "the law applicable to the case." *Therefore, any flaw in the charge on self-defense amounts to an error in the charge, even under the reasoning of* ***Posey.*** ***Id.*** at 519 (emphasis added.)

The ***Vega*** Court then wrote in a similar manner:

> The defense of entrapment was "law applicable to the case." Therefore, any defect in the charge on entrapment amounts to an error in the charge, *even under* ***Posey***. *The court of appeals, in holding otherwise, read* ***Posey*** *too expansively.* ***Id.*** at 520. (emphasis added.)

Therefore, the First Court of Appeals was correct in finding there was charge error and concluding the appellant had suffered egregious harm under ***Almanza v. State.***

Further, the State's reliance on the following unpublished opinions which predate ***Vega v. State*** and do not address ***Barrera v. State*** should not serve as the basis for overruling the judgment of the First Court of Appeals under ***Tex. R. App. P. 77.3***:

> ***Borja v. State***, No. 05-02-01378, 2003 WL 22017226 (Tex. App. – Dallas August 27, 2003, pet. ref'd.) (mem. op., not designated for publication)

> ***Shackelford v. State***, No. 14-04-00633-CR, 2005 WL 2230227 (Tex. App. – Houston [14th Dist.] Sept. 13, 2006, pet. ref'd.) (mem. op., not designated for publication)

> ***Wilkerson v. State***, No. 05-98-00987-CR, 2000 WL 566960 (Tex. App. – Dallas Apr, 28, 2000, no. pet.) (op. nunc. pro. tunc) (mem. op., not designated for publication)

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the appellant requests this Court to affirm the lower court's judgment in its entirety. ***Tex. R. App. P. 78.1(a)***.

Respectively submitted

/s/Kurt B. Wentz

KURT B. WENTZ
5629 FM 1960 West Suite 115
Houston, Texas 77069
Phone: 281/587-0088
State Bar No. 21179300
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to ***Texas Rule of Appellate Procedure 9.4(i)***, the undersigned attorney certifies that the number of words in the foregoing computer-generated document is 1,574 , based upon the representation provided by the word processing program that was used to create the document, and excluding the portions of the document identified ***Rule 9.4(i)***.

CERTIFICATE OF SERVICE

I, KURT B. WENTZ, hereby certify that a copy of the foregoing instrument was sent to the following email addresses via TexFile on August 18, 2017.

/s/ Kurt B. Wentz

KURT B. WENTZ
5629 FM 1960 West
Suite 115
Houston, Texas 77069
Phone: 281/587-0088
State Bar No. 21179300
ATTORNEY FOR APPELLANT

Molly Wurzer
Assistant District Attorney
1201 Franklin, Suite 600
Houston, TX 77002
(713) 274-5826
State Bar No. 24082073 email: wurzer_molly@dao.hctx.net

Stacey M. (Goldstein) Soule
State Prosecuting Attorney
P.O. Box 23046
Austin, TX 78711
email: information@spa.texas.gov